

Message Text

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PAGE 01 GENEVA 05809 01 OF 02 141836Z

ACTION EB-07

INFO OCT-01 OIC-02 IO-13 ISO-00 AF-10 ARA-10 EA-07
EUR-12 NEA-10 AGRE-00 CEA-01 CIAE-00 COME-00
DODE-00 FRB-03 H-01 INR-07 INT-05 L-03 LAB-04
NSAE-00 NSC-05 PA-01 EPG-02 AID-05 SS-15 STR-04
ITC-01 TRSE-00 USIA-06 PRS-01 SP-02 FEAE-00
OMB-01 XMB-02 /141 W

-----055482 141900Z /42

R 141740Z JUL 77

FM USMISSION GENEVA
TO SECSTATE WASHDC 9202
INFO AMEMBASSY BRUSSELS
AMEMBASSY THE HAGUE
AMEMBASSY PARIS

LIMITED OFFICIAL USE SECTION 1 OF 2 GENEVA 5809

USEEC

E.O. 11652: N/A

TAGS: ETRD, GATT

SUBJECT: GATT COUNCIL -- DISC

REF: A. GENEVA 4083, B. GENEVA 4458, C. PARIS 19984, D. PARIS 19782

1. ALTHOUGH EC HAS NOT YET FORMALLY REQUESTED THAT DISC BE ADDED TO THE JULY 26 COUNCIL AGENDA, COMMISSION OFFICIALS HAVE TOLD US THEY WILL DO SO. WE WILL, OF COURSE, THEN REQUEST THAT THE TAX PRACTICES OF BELGIUM, FRANCE AND THE NETHERLANDS BE ADDED TO THE AGENDA.

2. IN DEVELOPING GUIDANCE FOR THIS MEETING, WASHINGTON SHOULD CONSIDER WHETHER WE CONTINUE TO FOLLOW THE SAME TACTICS AS AT THE LAST THREE COUNCIL MEETINGS -- THAT IS, STATE OUR POSITION THAT ALL FOUR REPORTS SHOULD BE ADOPTED TO-

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PAGE 02 GENEVA 05809 01 OF 02 141836Z

GETHER WITHOUT COMMENTING IN DETAIL UPON THE CRITICISMS RAISED BY THE FRENCH, NETHERLANDS AND BELGIUM -- OR WHETHER WE SHOULD ATTEMPT, IN SOME MANNER, TO RESPOND TO THESE CRITICISMS. (UP TO NOW OUR BASIC ATTITUDE HAS BEEN THAT PANELS WERE OBJECTIVE, COMPETENT, AND EXAMINED QUESTION FULLY OVER PERIOD OF SEVERAL MONTHS. ACCORDINGLY, NO NEED FOR COUNCIL TO TRY TO DUPLICATE THIS

TECHNICAL EXAMINATION. FRENCH, BELGIANS, DUTCH HAVE QUESTIONED PANELS' REASONING RE THEIR PRACTICES, AND IN EFFECT HAVE BEEN ASKING COUNCIL TO REACH DIFFERENT CONCLUSIONS AFTER LIMITED TECHNICAL CONSIDERATION.)

3. SUPPORT FOR THE U.S. POSITION LINKING THE FOUR PANEL REPORTS, NEVER ENTHUSIASTIC TO BEGIN WITH, HAS BEEN WANING, AS EVIDENCED BY THE COUNCIL MEETING IN MAY (REF A). THIS DIMINISHING SUPPORT IS DUE, IN PART, TO THE FACT THAT THE DISC IS THE TAX PRACTICE MOST COUNTRIES WANT TO SEE DISMANTLED, AND, IN PART, TO GROWING AGREEMENT WITH THE ARGUMENT MADE BY THE OTHERS THROUGH REPETITION AND LOBBYING THAT THEIR CASES ARE DIFFERENT THAN THE DISC AND THAT THE PANEL USED AN ERRONEOUS BASIS FOR ITS DECISIONS ON THEIR TAX PRACTICES. THIS ARGUMENT HAS BEEN BUTTRESSED BY THE REPORT OF THE INTERNATIONAL CHAMBER OF COMMERCE (REF B) AGREEING WITH THESE COUNTRIES. WE CAN EXPECT THAT ICC STATEMENT TO BE QUOTED IN THE COUNCIL AS WELL AS REFERENCES TO THE CONSISTENCY OF THE TAX PRACTICES OF THESE COUNTRIES WITH THE OECD MODEL CONVENTION AS WAS DONE RECENTLY IN THE OECD FISCAL COMMITTEE (REF C).

4. WHILE WE CAN PROBABLY CONTINUE TO STALEMATE SEPARATE ACTION IN THE COUNCIL ON THE DISC BY ARGUING THAT ALL PANEL REPORTS SHOULD BE ADOPTED TOGETHER AND BY PAINT-LIMITED OFFICIAL USE

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PAGE 03 GENEVA 05809 01 OF 02 141836Z

ING THE EC AS THE ONE VIOLATING TRADITIONAL GATT DISPUTE SETTLEMENT PRRXSUR FAILURE TO ENTER INTO A DE-TAILED DEBATE ON SOME OF THE COMMENTS BY THE EC AND ITS MEMBER STATES IS GIVING INCREASING CREDIBILITY TO THE ARGUMENTS THEY HAVE ADVANCED.

5. WE THEREFORE SUGGEST THAT WASHINGTON CONSIDER DEVELOPING CONTINGENCY TALKINGPOINTS TO COUNTER THE ICC STATEMENT, THE APPARENT CONFLICT BETWEEN THE OECD DRAFT CODE AND THE RULINGS OF THE PANELS, AND CLAIMS OF THE THREE EC MEMBER STATES.

6. THE MAIN THRUST OF THE THREE STATES' ARGUMENTS (C/97, C/98, C/99) APPEARS TO REST ON THE CLAIM THAT THE PANEL WENT BEYOND ITS AUTHORITY IN USING AN EXCEPTIONALLY WIDE DEFINITION OF EXPORT OR EXPORT ACTIVITY, A DEFINITION, AS THE FRENCH STATE, "GOING

WELL BEYOND THAT DERIVING FROM THE LETTER, SPIRIT AND PRACTICE OF THE GATT." WE HAVE RESEARCHED GATT DOCUMENTS

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PAGE 01 GENEVA 05809 02 OF 02 141849Z
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LIMITED OFFICIAL USE SECTION 2 OF 2 GENEVA 5809

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AND CAN FIND NO RECORD OF ANY GATT DEFINITION OF
"EXPORTS" OR "EXPORT ACTIVITY," AND HAVE SO STATED IN
COUNCIL AS PARTIAL REBUTTAL FRENCH THESIS. THE GATT
SECRETARIAT CONFIRMS OUR CONCLUSION AND STATES THAT NO
ATTEMPT HAS EVER BEEN MADE BY THE GATT TO DEFINE EXPORTS.
OF COURSE, ONE MIGHT ATTEMPT TO IMPUTE A DEFINITION OF
EXPORT OR EXPORT ACTIVITY FROM DETERMINATION OF WHAT
IS AN IMPORT, A PROCESS THAT INVOLVES LOOKING AT RULES
OF ORIGIN AND GATT ATTEMPTS TO DEFINE THE ORIGIN OF AN
IMPORT. (A GATT 1953, WORKING PARTY COULD NOT AGREE ON
A DEFINITION OF ORIGIN FOR IMPORTED GOODS -- SEE GATT
SUPPLEMENTS 1S/104, 2S/53, 3S/94.) AS WE INTERPRET
THE FRENCH STATEMENT, IF A FRENCH FIRM EXPORTS TO ITS
SUBSIDIARY IN, LET US SAY, SWEDEN, THE FRENCH WOULD
CLAIM THAT THE GOOD IS NO LONGER FRENCH WHEN THE SUB-
SIDIARY IN SWEDEN REEXPORTS THE ITEM. THEREFORE,
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PAGE 02 GENEVA 05809 02 OF 02 141849Z

FRENCH TAXES DO NOT NEED TO BE PAID ON THIS EXPORT

ACTIVIYT SINCE IT INVOLVES A SWEDISH, NOT A FRENCH, EXPORT. ON THE OTHER HAND, IF A U.S. COMPANY EXPORTS TO ITS SUBSIDIARY IN SWEDEN AND THE SUBSIDIARY REEXPORTS THE ITEM TO FRANCE (PERHAPS AFTER ASSEMBLY, ETC.), THE FRENCH WOULD CONTINUE TO CONSIDER THIS IMPORT A U.S. PRODUCT (DEPENDING ON VALUE ADDED) FOR THE PURPOSE OF CUSTOMS DUTIES. THE FRENCH WOULD THUS USE ONE DEFINITION OF EXPORTS FOR TAX PURPOSES AND ANOTHER FOR THE IMPOSITION OF CUSTOMS DUTIES. IT SEEMS TO US THAT THE FRENCH CANNOT HAVE IT BOTH WAYS AND WE MAY WANT TO POINT THIS OUT IN REBUTTING THEIR CLAIM THAT THE PANELS WENT BEYOND THE USUAL DEFINITION OF EXPORTS IN FINDING THAT THE TAX PRACTICES OF FRANCE, NETHERLANDS AND BELGIUM WERE SUBSIDIES UNDER XVI:4. (WE HAVE ALSO MADE THE POINT IN THE COUNCIL THAT LEAVING ASIDE THIS PERIPHERAL QUESTION OF REEXPORTS, THE PANEL FINDINGS RELATED ESSENTIALLY TO TRANSACTIONS THAT ALL WOULD CONSIDER AS EXPORTS UNDER ANY NORMAL DEFINITION.)

7. WE REALIZE WASHINGTON MAY NOT WISH TO RAISE RULES OF ORIGIN IN THIS CONTEXT AND OFFER IT AS ONE LINE OF REBUTTAL TO THE OTHERS' CLAIMS.

8. IT WOULD ALSO HELP IF WE COULD STATE THAT TREASURY IS CONSIDERING RECOMMENDING THAT DISC BE ABOLISHED AS INDICATED BY ASST SECRETARY WOODWORTH AT OECD (REF D). ASSUME WE CAN MAKE SAME STATEMENT IN GATT COUNCIL.

9. WHILE WE REALIZE DANGERS OF ENTERING ON SLIPPERY SLOPE IF WE GO TOO FAR IN GETTING INTO TECHNICAL DEBATE IN COUNCIL, THUS RE-OPENING PANEL CONCLUSIONS, NEVER-LIMITED OFFICIAL USE

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PAGE 03 GENEVA 05809 02 OF 02 141849Z

THELESS BELIEVE IT WOULD BE USEFUL HAVE TALKING POINTS TO REFUTE FRENCH, BELGIAN, DUTCH ARGUMENTS THAT PANELS WERE ERRONEOUS IN THEIR CONCLUSIONS ON THEIR TAX PRACTICES. VANDEN HEUVEL

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